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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JOHN ROSS TIDWELL, Defendant and Appellant.	C042112 (Super. Ct. No. 01F05147)

A jury found defendant John Ross Tidwell guilty of 35 out of 36 counts of sexual offenses against two minors. (Pen. Code, §§ 269, subd. (a)(1), 286, subd. (c)(1), 288, subds. (a), (c)(1), 288a, subd. (c)(1), 289, subd. (j).) The trial court sentenced him to state prison for a determinate term of 57 years 4 months, with a consecutive indeterminate life sentence carrying a minimum term of 60 years.

On appeal, the defendant contends that the testimony of one witness exceeded the bounds permitted under the "fresh complaint" doctrine; that the admission of evidence of uncharged sexual offenses (Evid. Code, § 1108), in combination with the

standard instruction on the use of this evidence as proof of propensity (which can be proof of his guilt of the present offenses), was a violation of due process; and that the evidence is legally insufficient to support the verdict on counts 26 through 36, which involve crimes against his wife's niece. We solicited supplementary briefing from the parties on the effect of *Stogner v. California* (2003) 539 U.S. ___ [156 L.Ed.2d 544] (*Stogner*) on counts 26 through 36, because the allegations and proof involve conduct over a range of time more than six years before the January 1, 1994, effective date of Penal Code section 803, subdivision (g), for which the statute of limitations thus had expired under *Stogner*.

We shall reverse counts 26 through 36 with directions to dismiss the charges as time-barred. As this simply reduces defendant's determinate term by 20 years and does not otherwise affect the consecutive structuring of his sentence, there is no need to remand for resentencing. We shall otherwise affirm.

The contentions on appeal do not generally implicate the details of the underlying offenses. We shall incorporate any pertinent facts in the Discussion.

DISCUSSION

I

The court permitted a witness to relate statements that the defendant's wife's niece made when she was 10 years old regarding the defendant's conduct with her when she was between the ages of two and seven. The defendant argues this testimony exceeded the limits on extrajudicial statements admitted

pursuant to the doctrine of fresh complaint, which allows evidence of the complaint and the circumstances under which the victim made it, but not the details of the conduct that is the subject of the fresh complaint. (*People v. Brown* (1994) 8 Cal.4th 746, 759-760.) However, as we will reverse all the counts involving the niece with directions to dismiss them, we need not reach the issue.

II

The defendant contends admission of evidence, pursuant to Evidence Code section 1108, of uncharged sexual offenses with the other victim (his stepdaughter) in Nevada, and the standard instructions that explain that this conduct *can* prove propensity (from which the jury *can* infer guilt of the charged offenses), violated his right to due process. He concedes that this argument has been rejected in controlling authority (*People v. Reliford* (2003) 29 Cal.4th 1007 (*Reliford*); *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*)), and merely raises the issue to preserve it for possible review in federal courts. We reject the claims under the authority of *Falsetta* and *Reliford*.

To the extent the defendant includes an argument that the evidence of uncharged offenses with the victim does not satisfy *Falsetta*'s criterion for admission--that it be more probative than prejudicial (21 Cal.4th at pp. 916-917)--we do not agree.[1]

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[1] As this argument appears in a single paragraph in the midst of his 12 pages of argument on Evidence Code section 1108 and the alleged flaws in the instructions, arguably the defendant has waived consideration of this "lurking" argument. (*Opdyk v.*

As we explained in *People v. Harris* (1998) 60 Cal.App.4th 727, the factors which should guide this weighing process include the inflammatory nature of the evidence (*id.* at pp. 737-738), the degree to which it could confuse the issues (*id.* at pp. 738-739), the degree to which it involves conduct remote in time (*id.* at p. 739), the degree to which it would consume an excessive amount of time to establish (*ibid.*), and the extent to which it is probative (*id.* at pp. 739-740). The uncharged conduct with the stepdaughter during her 8th grade year (sexual intercourse and mutual oral copulation) was no more egregious than the charged conduct that took place when the stepdaughter was in the 5th through 7th grades, and in fact included expressions of remorse on the part of the defendant and promises that it would never happen again. There is no possibility of confusion, as the jury had the same credibility issues to resolve, and the numerous charges the defendant faced in the present prosecution minimized any concern that the jury would focus on the failure to prosecute him for the uncharged offense. The conduct was *less* remote in time than the charged offenses. The stepdaughter's testimony on this issue was less than a dozen pages of transcript. Finally, the incident was strongly probative on the question of defendant's credibility and his propensity to commit the offenses. We do not find an abuse of discretion in the decision to admit it.

California Horse Racing Bd. (1995) 34 Cal.App.4th 1826, 1830, fn. 4.) We shall entertain it, however, as it is easily resolved.

III

On appeal, the defendant contends the testimony of the niece must be rejected on appeal because it is "inherently improbable" as a result of being physically impossible (*People v. Mayberry* (1975) 15 Cal.3d 143, 150), and therefore the verdicts involving offenses against her lack substantial evidence in support. We need not, however, describe the bases for this argument further. As we noted at the outset, there is a more fundamental flaw in these convictions.

In the November 2001 information, the People alleged that the offenses against the defendant's niece by marriage occurred "[o]n or about and between April 09, 1987, and April 08, 1993 . . . ." As to these counts, the People alleged facts to bring the offenses within the provisions of Penal Code section 803, subdivision (g)(1), in that they filed their complaint within one year of the minor victim's report of the offenses, the offenses involved substantial sexual conduct, and there was corroboration in the form of the stepdaughter's report of similar conduct by the defendant. The defendant unsuccessfully sought to dismiss these charges as untimely on the ground the actual facts did not come within the statute. He unsuccessfully renewed this motion after trial.

There is scant evidence on the timing of the offenses, which is not surprising in light of the limitations period prevailing at the time of trial. The niece was born in April 1985. She recalled that the offenses occurred continuously between the ages of two and seven. During this period, her aunt

and the defendant babysat for her, first in an apartment and later in a house that was across from her grammar school. On every occasion that they were together, the defendant sodomized her; she also recalled a specific instance of fellatio at the apartment when she was two or three years old. She was unable to connect any specific incident with any particular grade in school or event in her life. She believed the incidents were more frequent when she was six or seven. Again, because it was not an issue, there were not any instructions on the need to find that the offenses were within the limitations period.

Stogner found that Penal Code section 803, subdivision (g), violated constitutional prohibitions against ex post facto laws to the extent it allowed for the prosecution of offenses that were time-barred before its January 1, 1994, effective date. (*Stogner, supra,* 539 U.S. at p. ___ [156 L.Ed.2d at p. 550].)

The People concede in their supplementary letter brief that the evidence under *Stogner* must establish that offenses occurred after December 31, 1987, in order to avoid an ex post facto revival, that evidence of the date of the fellatio offense is equivocal, and that we must therefore reverse that conviction as a result. (*People v. Angel* (1999) 70 Cal.App.4th 1141, 1146-1147 (*Angel*); *People v. Gordon* (1985) 165 Cal.App.3d 839, 846, 851-852 (*Gordon*).)[2]

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[2] *People v. Smith* (2002) 98 Cal.App.4th 1182, 1192 (*Smith*), criticized this aspect of *Angel*. *Smith*, however, involved a defendant who challenged only *intent*, not the commission of the sexual acts. (*Id.* at pp. 1189-1190.) The evidence was thus

As for the sodomy convictions, however, the People make a novel argument. Because they must prove an offense is within the statute of limitations by only a preponderance of the evidence, and because the niece testified to incidents occurring throughout the period of time alleged in the information (with more occurring toward the end), a preponderance of the convictions (i.e., six out of ten) are valid. However, as Justice Sparks stated in *Gordon*, "In the absence of an appropriate instruction, that equivocal proof fails as a matter of law to overcome the prosecution's burden[]" (165 Cal.App.3d at p. 852), and as Presiding Justice Ardaiz explained in *Angel*, "we cannot tell whether the jury convicted appellant of offenses not shown to have been committed within the period of limitations," rendering the convictions "fatally defective" (70 Cal.App.4th at p. 1147). We must thus reverse these ten convictions as well.

Finally, the People suggest we may allow retrial of these 11 counts. This is incorrect; we must reverse with directions to dismiss the counts. (*Angel*, *supra*, 70 Cal.App.4th at p. 1151; *Gordon*, *supra*, 165 Cal.App.3d at p. 865.) Their

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undisputed that he committed at least one of the offenses within the limitations period (triggering a tolling provision as to the remainder). When the evidence in the record is *undisputed*, a reviewing court may determine that a tolling provision applies. (*People v. Williams* (1999) 21 Cal.4th 335, 345 (*Williams*).) In *Angel*, *supra*, 70 Cal.App.4th at page 1144, *Gordon*, *supra*, 165 Cal.App.3d at page 848, and the present case, the defendants *denied* committing the acts, some of which were unquestionably time-barred. The principle from *Williams* on which *Smith* relies is thus inapposite.

citation of *Peracchi v. Superior Court* (2003) 30 Cal.4th 1245 is inapt; at issue was whether resentencing on remand (where the People did not choose to retry a reversed conviction) was a new trial such that a defendant could issue a peremptory challenge when the trial judge presided over resentencing. To the extent there may be dictum regarding the *usual* discretion we accord the People in deciding whether to retry a reversed conviction (30 Cal.4th at p. 1255), it has no bearing in the present context.

As we noted at the outset, the defendant's sentence on these invalid convictions is only a small part of the consecutive design of what otherwise amounts to a life term without the possibility of parole. There is no need to remand for resentencing, beyond deleting the sentences for the reversed convictions.

DISPOSITION

The convictions on counts 26 to 36 are reversed; the trial court is directed to dismiss these counts and forward an amended abstract of judgment to the Department of Corrections. The judgment is otherwise affirmed.

DAVIS, J.

We concur:

SCOTLAND, P.J.

NICHOLSON, J.